No. 97-804

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

COUNTY OF STANISLAUS, a public entity; and MARY GROGAN, an individual; on behalf of themselves and all others similarly situated,

Petitioners,

vs.

PACIFIC GAS & ELECTRIC COMPANY; PACIFIC GAS TRANSMISSION COMPANY and ALBERTA & SOUTHERN GAS COMPANY, LTD.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Where, in violation of the antitrust laws, a monopoly utility voluntarily decides to purchase its imported natural gas supplies almost exclusively from an affiliated company who contracted with an illegal cartel, to the exclusion of lower-cost sources, does the fact that the United States Economic Regulatory Administration (ERA) had *permissively* approved the volume of natural gas imported from Canada conclusively establish the reasonableness of the utility's decision to purchase from only one available source, such that the "filed rate doctrine" bars any antitrust challenge to the utility's conduct?

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Mary Grogan, an individual, and County of Stanislaus, a public entity, Petitioners herein, respectfully submit this reply brief in support of their petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

ARGUMENT IN REPLY TO OPPOSITION BRIEF

In the Court of Appeals below, the Ninth Circuit held that a monopoly public utility which imported its natural gas solely from its foreign affiliates may seek shelter behind the filed rate doctrine, even though federal regulators did not order the utility to purchase the gas from any particular source. Rather, the relevant federal agency permitted the utility to make a free-market selection among all available and federally-approved sources, *assuming* that the purchaser would select the lowest-price source.

In this case, the relevant federal regulatory agency approved many possible sources from which respondent Pacific Gas & Electric Company ("PG&E") could import natural gas supplies. However, respondent PG&E abused the free market by purchasing solely from its foreign affiliates, even though lower-cost gas was also available and had also been approved by the federal regulators.

The filed rate doctrine does not license a utility to engage in voluntary collusive conduct by doing business only with its foreign affiliates, to the exclusion of lower-cost supplies. Where conduct is mandated by federal agencies, the filed rate doctrine applies. Where, as here, the conduct was *discretionary* with the utility, the filed rate doctrine does not bar a private antitrust action by injured customers.

I.

ERA APPROVED THE INTERNATIONAL CONTRACT BECAUSE IT PERMITTED "FLEXIBILITY" IN SOURCE SELECTION; IT NEVER DEEMED "COMPETITIVE" RESPONDENTS' SUBSEQUENT PURCHASE OF *ALL* OF THEIR CANADIAN GAS FROM AFFILIATES.

Respondents' Question Presented incorrectly states that the International Contract between respondents Pacific Gas Transmission Company ("PGT") and Alberta & Southern Gas Company, Limited ("A&S") was found to be "competitive" by federal regulators, as if such approval meant that respondent PGT was entitled to import *all* of its natural gas from its affiliate, respondent A&S. However, the Economic Regulatory Administration ("ERA") approved the International Contract because of its "flexibility" and *because it permitted PGT to be "market responsive." Pacific Gas Transmission Co.*, 1 ERA ¶ 70,591 at p. 72,386 (1984). ERA approved the International Contract because the Contract permitted PGT to import from other sources, and ERA assumed that a "market-responsive" natural gas importer would seek out the lowest price, not the highest.[1] ERA's goal was to ensure that "applicants and their agents will face *competition* from others obtaining the ERA authorizations. . . ." *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin.*, 847 F.2d 1168, 1177 (5th Cir. 1988) (emphasis added).

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1. The underlying assumption on ERA's part is that purchasers will buy the lowest-priced approved volumes. ERA assumed that:

> if the terms were flexible enough (allowing the price to move down and the importer to reduce volumes), no gas would be imported unless it were priced competitively.

Panhandle Producers v. Economic Regulatory Admin., 822 F.2d 1105, 1113 (D.C. Cir. 1987).

ERA's approval of numerous other natural gas imports provided Respondents with the option to purchase natural gas from a broad range of suppliers. *See, e.g., Salmon Resources, Ltd.*, 1 ERA ¶ 70,749 (1988); *Development Assoc., Inc.*, 1 ERA ¶ 70,765 (1988); *Amoco Energy Trading Corp.*, 1 ERA ¶ 70,772 (1988); *Kerr McGee Chem. Corp.*, 1 ERA ¶ 70,840 (1989). In spite of this array of sources approved by the ERA, respondent PG&E voluntarily chose to purchase nearly all of its Canadian gas from its affiliates, thereby filling the PGT interstate pipeline and precluding other end users from purchasing lower-cost Canadian supplies. PG&E's incentive was to engage in collusive, market-preclusive contracts with its affiliates, to the injury of natural gas consumers.

Thus, the ERA's determination that the International Contract was "competitive" merely meant that approving an array of volumes for import was pro-competition; it was not a judgment that, if Respondents were subsequently to purchase Canadian natural gas *solely* under the inter-affiliate contract, such conduct would be deemed "competitive" such that it barred any challenge to the purchasing decision. Therefore, Respondents' choice to buy nearly all of its imported natural gas from a cartel is not immune from the antitrust laws.

Respondents state several times in their Opposition Brief that ERA approved the "precise" prices and volumes of the Canadian natural gas that respondent PG&E purchased pursuant to the contracts with its affiliates. No matter how many times Respondents repeat the point, they are still wrong. Indeed, this much is admitted at one point in the Opposition Brief.[2] In fact, once ERA had approved the International Contract, due to its flexibility, *ERA never made a specific determination thereafter*

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2. "ERA approved the International Contract as a whole, not a price *per se*." Respondents' Opposition Brief at 12.

as to the reasonableness of the subsequent prices and volumes of gas that respondent PGT imported and PG&E subsequently purchased.[3] Rather, Respondents were merely required to lodge quarterly and annual reports with ERA. Those reports were not an ERA mandate that PG&E purchase the gas at all — much less at any precise price or volume.[4]

Accordingly, the question presented by the instant Petition was properly phrased, but erroneously answered, by the Ninth Circuit. The Court of Appeals below held that the central question was whether "ERA-approved volumes are conclusively reasonable," *County of Stanislaus*, App. A at 13a, such that respondent PG&E could freely purchase *all* of its natural gas from a single affiliated source, to the exclusion of all other approved sources, because the filed rate doctrine "forecloses *any* challenge to importation volumes." *Id.* at 13a (emphasis added). Public utilities are encouraged by this erroneous decision to seek ERA import authorizations from only one source — their

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3. Even if ERA had approved "precise" volumes and prices (which it did not), this would be irrelevant to the application of the filed rate doctrine. Assuming *arguendo* that ERA had approved precise volumes and prices, PGT would still have been free to choose voluntarily whether to purchase those volumes at those prices. The filed rate doctrine only immunizes conduct *mandated* by the regulators; under the *Nantahala* exception, the doctrine does not immunize conduct that is *discretionary* with the utility. *Nantahala*, 476 U.S. at 972; *MP&L*, 487 U.S. at 373–374.

4. Respondents contend that interested parties were afforded the opportunity to oppose the prices and volumes reflected in the quarterly and annual reports cited by Respondents. This is false. Once ERA had approved the amended International Contract in 1984 — the document which merely *permitted* PGT to import the gas if it chose — *no one had any opportunity to oppose the quarterly reports filed by PGT thereafter*, and "the ERA never made any findings as to whether these new rates were in the public interest." *Re Pacific Gas & Elec. Co.*, 137 Pub. Util. Rep. 4th 346, 353 (Cal. P.U.C. 1992).

high-cost foreign affiliates. Under the *County of Stanislaus* rule, neither an antitrust action nor a state public utility commission may review such anticompetitive conduct. This behavior should not have been immunized by the Ninth Circuit.

II.

THE REGULATION OF NATURAL GAS IMPORTS DOES NOT INCLUDE ANY MANDATE THAT RESPONDENTS PURCHASE SOLELY FROM THEIR FOREIGN AFFILIATES.

ERA expressly stated that it approved the International Contract between respondents PGT and A&S because of the "flexibility" which the International Contract gave the purchaser to be "market-responsive" and to purchase from among *competing* supplies. *Pacific Gas Transmission Co.*, 1 ERA ¶ 70,591 at p. 72,386 (1984). To permit respondent PGT to ignore all competing sources, and to allow it to purchase its Canadian natural gas solely from its affiliates, would render meaningless ERA's approval of the International Contract on the ground that it permitted PGT to be "market-responsive."

Respondent PG&E was by no means required to purchase its natural gas from its affiliates. Indeed, in 1984, the Federal Energy Regulatory Commission ("FERC") eliminated respondent PG&E's "minimum take" obligation under its service agreement with respondent PGT, such that PG&E had discretion whether or not to purchase any of PGT's volumes. Order 380-A, FERC Stats. & Regs. 1982-1985 ¶ 30,584 at p. 31,061 (1984), *aff'd, Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986). Then, in 1990, FERC eliminated PG&E's 50% "minimum bill" obligation, such that PG&E was not required to pay for PGT's gas supplies. *Pacific Gas Transmission Co.*, 50 FERC ¶ 61,067 at p. 61, 132 (1990).

Under the terms of the amended International Contract approved by ERA, and as a result of both FERC orders, PG&E was free to purchase no gas at all from PGT or A&S, yet PG&E purchased the most expensive gas in Canada almost exclusively from its wholly-owned subsidiaries.

Where a utility has purchased virtually all of its imported natural gas from one ERA-approved source, and has not been *ordered* to choose that particular source by any agency, the utility should not find shelter from the antitrust laws in the filed rate doctrine.

III.

THE PREVAILING FEDERAL LAW REQUIRES THAT THE NINTH CIRCUIT'S DECISION BE OVERTURNED.

In their Opposition Brief, Respondents argue that Petitioners incorrectly apply this Court's interpretation of the filed rate doctrine in *Nantahala* to the antitrust realm. However, it was the Ninth Circuit, not Petitioners, who linked *Nantahala* to Petitioners' private antitrust case. It was the Ninth Circuit that further held that this Court intended *Nantahala* to mean that a utility may choose to purchase all of its natural gas from the highest-priced available source, without "*any* challenge," App. A at 13a, so long as a federal agency had once approved that particular volume (among many others) for purchase. It was the Ninth Circuit that relied almost exclusively on an erroneous interpretation of *Nantahala* to bar Petitioners' market preclusion claims.[5] This Court should correct the Ninth Circuit's erroneous

5. Petitioners do not address their Petition to their claims for price-fixing below. Instead, they address this Petition to the incorrect application of *Nantahala* and the filed rate doctrine to bar their market preclusion claims *only*, claims which have been at issue since the inception of the case despite Respondents' assertion to the contrary. *See* First Amended Complaint, CR 61 ¶¶ 4, 64–69, 107–134.

holding that the filed rate doctrine bars Petitioners' claims for market preclusion.

Moreover, Respondents' contention that the Ninth Circuit's opinion was narrow, and that its handling of *Nantahala* was merely *dicta*, is unsupported by the opinion below. The Ninth Circuit held:

> Guided by Supreme Court precedent, the complimentary jurisdiction of ERA and FERC, and the Supremacy Clause, we *hold* that ERA approval establishes an import volume as conclusively reasonable and thereby forecloses *any challenge* to importation volumes.

App. A at 13a (emphasis added). This is neither *dicta* nor narrow in scope.

The majority of circuits, and this Court *in dicta*,[6] have agreed that under the *Nantahala* exception, the filed rate doctrine does not shield a utility's anticompetitive selection of energy sources, except where the utility has been *ordered* to select a particular source.

> Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility **from a particular source** could be deemed unreasonably excessive **if lower cost power is available elsewhere**, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, price.

Nantahala, 476 U.S. at 972 (boldface added, italics in original).

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6. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 373–374 (1988).

In *MP&L*, as in *Nantahala*, this Court did not address the merits of the issue left open in *Nantahala*, since it also involved a FERC mandate that the electric utility purchase a specific quantity of power from a particular source. The *MP&L* Court did, however, clarify its *dicta* in *Nantahala*:

> As we assumed, *it might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power*, even at FERC-approved rates, if it had the legal right to refuse to buy that power. . . . Just as Nantahala had no legal right to obtain more low-cost TVA power than the amount allocated by FERC, it is equally clear that MP&L may not pay for less Grand Gulf power than the amount allocated by FERC.

MP&L, 487 U.S. at 373–74 (emphasis added). Whether the issue arises in the context of a private antitrust case or any other context, the rule of these cases is clear: if a utility is *ordered* to purchase from one source, to the exclusion of lower-cost supplies, the filed rate doctrine bars review of that conduct; if, on the other hand, a utility has a legal right to purchase its power from among many alternative sources, the filed rate doctrine does not shield a review of the utility's decision to purchase exclusively from one high-cost source. This is especially true where the utility formed an illegal cartel to accomplish this purpose. *See* CR 61 ¶¶ 36–42.

At least four other circuits have concluded that the filed rate doctrine does not bar a challenge to a utility's voluntary decision to purchase a particular quantity of power from a particular source when other lower-cost supplies are available and have been approved by the regulatory agency. *See Kentucky W. Virg. Gas Co. v. Penn. Pub. Util. Comm'n*, 837 F.2d 600 (3d Cir. 1988), *cert. denied*, 488 U.S. 941 (1988) ("*Kentucky West*

I"); *Kentucky W. Virg. Gas Co. v. Penn. Pub. Util. Comm'n*, 862 F.2d 69 (3d Cir. 1988) ("*Kentucky West II*"); *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 911 F.2d 993 (5th Cir. 1990), *cert. dism'd*, 502 U.S. 954 (1991) ("*NOPSI III*"); *Appalachian Power Co. v. Public Serv. Comm'n of W. Virginia*, 812 F.2d 898 (4th Cir. 1987); *Arkansas Power & Light Co. v. Missouri Pub. Serv. Comm'n*, 829 F.2d 1444 (8th Cir. 1987).

Respondents' Opposition Brief has nothing to offer the Court on these cases except overwhelming silence. Rather, Respondents attempt to paint this circuit conflict merely as a distinction between antitrust cases and Supremacy Clause cases. However, *the Ninth Circuit drew no such distinction* when it used "Supreme Court precedent [*i.e.*, *Nantahala*], the complimentary jurisdiction of ERA and FERC, and the Supremacy Clause" to bar plaintiffs' antitrust market preclusion claims. App. A at 13a. The Ninth Circuit created the conflict in *all* contexts in which the filed rate doctrine applies when it reduced *Nantahala* and *MP&L* — and their distinction between *mandated* conduct and *permitted* conduct — to nothing.

Nantahala and *MP&L* forbid the immunity provided by the filed rate doctrine from being applied to a utility which had a legal right to purchase lower-cost supplies elsewhere. Here, ERA expressly stated that it approved the International Contract because of the *flexibility* the contract gave respondent PGT to be "market-responsive," *i.e.*, to purchase from among competing supplies. *Pacific Gas Transmission Co.*, 1 ERA ¶ 70,591 at p. 72,386 (1984) (elimination of minimum purchase obligations in International Contract and flexibility of pricing terms permits the parties to be market-responsive). Thus, Respondents had a legal right to buy lower-cost supplies; under the *Nantahala* exception, its decision to purchase almost exclusively from its high-cost affiliate subjects it to antitrust liability.

CONCLUSION

The Ninth Circuit correctly acknowledged that *Nantahala* left open an important question concerning a utility's energy purchases. *County of Stanislaus*, App. A at 14a. However, the Ninth Circuit's incorrect interpretation of *which* issue was left open resulted in the Ninth Circuit rendering a decision in conflict with all other decisions addressing the applicability of the filed rate doctrine to a utility's purely *voluntary* decision to purchase its energy supplies from one source at above-market prices, notwithstanding the federal agency's approval of other, competitive supplies.[7]

The Court should grant the Petition and issue a writ of certiorari to review the decision of the Ninth Circuit in *County of Stanislaus*.

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7. Respondents contend that no enduring problem is created by the Ninth Circuit's error. This contention is belied by the fact that Respondents sought declaratory relief from the California Public Utility Commission's regulatory overview on the very basis of the Ninth Circuit's decision in *County of Stanislaus*. Moreover, the 1992 amendments to the Natural Gas Act, which compel the entry of *even more* "public interest" findings for imports, have actually exacerbated the problem with the Ninth Circuit's interpretation of such findings as precluding "any challenge." App. A at 13a.

Respectfully submitted,

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